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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GOLDEN EAGLE INSURANCE CORPORATION, Plaintiff, Cross-Defendant and Respondent, v. LEMOORE REAL ESTATE AND PROPERTY MANAGEMENT, INC., et al., Defendants, Cross-Complainants and Appellants.	F061735 (Super. Ct. No. 08C0115) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Shernoff Bidart Echeverria, Shernoff Bidart Echeverria Bentley, Michael J. Bidart, Ricardo Echeverria; Marderosian, Runyon, Cercone & Lehman, Michael G. Marderosian, Sue Cercone; The Ehrlich Law Firm and Jeffrey Isaac Ehrlich for Defendants, Cross-Complainants and Appellants.

Sheppard Mullin Richter & Hampton, Frank Falzetta, Scott Sveslosky, Brenda Bissett, Jennifer Hoffman; Lindahl Beck and Kelley K. Beck for Plaintiff, Cross-Defendant and Respondent.

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This is a declaratory relief action filed by an insurer against its insured and the insured's assignees, in which the assignees cross-complained against the insurer for bad faith. The insured, Lemoore Real Estate and Property Management, Inc. (Lemoore), and cross-complainants appeal from the judgment entered against them after the trial court granted the motion for summary adjudication and the motion for summary judgment filed by plaintiff and cross-defendant, Golden Eagle Insurance Corporation (Golden Eagle). The trial court found that Golden Eagle had no duty to indemnify Lemoore for the judgments entered against it in two wrongful death actions filed by cross-complainants; it subsequently found that Lemoore sustained no damage as a result of Golden Eagle's failure to provide it a defense in those actions. Finding no basis for liability on the complaint or cross-complaint, the trial court entered judgment in favor of Golden Eagle. We affirm. We find Golden Eagle met its burden of demonstrating that, on the undisputed facts, it was entitled to judgment as a matter of law. Lemoore and cross-complainants failed to raise a triable issue of material fact, and summary judgment was properly granted.

FACTUAL AND PROCEDURAL BACKGROUND

Lemoore and its principal, Glenda Allison, were licensed real estate brokers. Lemoore contracted with the Kinirys, owners of the Northgate Apartments, to provide property management services for the apartments. Dwight Young was employed by the Kinirys as the on-site property manager for the Northgate Apartments.

Golden Eagle issued a policy of business liability insurance to Lemoore for policy year January 1, 2007 to January 1, 2008. During the policy period, there was a fire in one of the apartments at Northgate, which killed five people. The survivors of the decedents (hereafter cross-complainants) sued Lemoore and the Kinirys for wrongful death, alleging negligence in their maintenance and control of the apartment and failure to keep the property in a safe condition. Lemoore tendered defense of the wrongful death actions to Golden Eagle, which did not undertake the defense. The Kinirys' insurer, Public

Services Mutual Insurance Company (PSMIC), retained attorneys and defended Lemoore in the consolidated actions.

The parties to the wrongful death actions entered into a settlement agreement, in which they agreed to resolve their dispute by reference to a retired judge under Code of Civil Procedure section 638, rather than by trial. In the agreement, Lemoore assigned to cross-complainants all of its rights against Golden Eagle arising out of Golden Eagle's purported failure to defend, settle within policy limits, or indemnify Lemoore in the wrongful death actions; cross-complainants promised not to execute against Lemoore on any judgment entered against Lemoore as a result of the reference. During the reference hearing, cross-complainants presented two theories of liability: (1) that Lemoore failed to maintain a functioning smoke detector in the decedents' apartment, and (2) that Lemoore failed to require the downstairs tenant to remove property and debris from her patio, which created a fire hazard. The evidence presented included evidence that Lemoore supervised Young, and his duties included testing the smoke detectors in the apartments and replacing any inoperable ones. The trial by reference resulted in a judgment in favor of cross-complainants totaling $29 million; 90 percent of the responsibility for the damages was attributed to Lemoore and 10 percent to the Kinirys.

Golden Eagle filed a declaratory relief action against Lemoore and cross-complainants, seeking a declaration that it had no duty to defend or indemnify Lemoore in the wrongful death actions because of the professional services exclusion in the insurance policy it issued to Lemoore. Cross-complainants, as assignees of Lemoore, filed a cross-complaint against Golden Eagle for breach of contract and breach of the covenant of good faith and fair dealing. Golden Eagle filed a motion for summary adjudication, seeking a determination that it owed no duty to indemnify Lemoore or its assignees for the wrongful death judgment. The trial court granted that motion, finding the professional services exclusion was clear and unambiguous, the services rendered by Lemoore that gave rise to liability to cross-complainants were professional services

within the scope of the exclusion, coverage could not be created by estoppel, and evidence of negligence could not create a triable issue of fact because the pleadings did not raise any issue of negligence.

On October 14, 2010, Golden Eagle filed a motion for summary judgment on the cross-complaint, asserting cross-complainants could not establish either of their causes of action because Golden Eagle had no duty to indemnify Lemoore or its assignees, as the trial court had previously determined, and Lemoore sustained no damages as a result of Golden Eagle's alleged breach of the duty to defend because it was fully defended by PSMIC at no cost to Lemoore. On October 18, 2010, Golden Eagle filed a request for dismissal of its declaratory relief complaint, "except for the requested determination of the duty to indemnify, already adjudicated by the court's 2-13-09 order." Dismissal was entered as requested. The trial court granted the motion for summary judgment, then entered final judgment in favor of Golden Eagle and against both Lemoore and cross-complainants. Lemoore and cross-complainants appeal. They do not challenge the ruling on the second motion—that Golden Eagle was not liable to Lemoore for failure to defend because another insurer paid for the defense in the underlying action. They challenge the judgment to the extent it was based on the ruling on the first motion—that Golden Eagle had no duty to indemnify Lemoore for its liability to cross-complainants.[1]

DISCUSSION

I. Review of Summary Judgment

Summary judgment is properly granted when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "As a summary judgment motion raises only questions of law regarding the construction and effect of supporting and opposing papers, this court

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[1] We grant Golden Eagle's June 15, 2011, motion for judicial notice of pleadings from cross-complainants' separate negligence action. (Evid. Code, § 452, subd. (d).)

independently applies the same three-step analysis required of the trial court. We identify issues framed by the pleadings; determine whether the moving party's showing established facts that negate the opponent's claim and justify a judgment in the moving party's favor; and if it does, we finally determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citations.]" (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.)

II. Interpretation of Insurance Contracts

"Interpretation of an insurance policy is primarily a judicial function. When the trial court's interpretation did not depend upon conflicting extrinsic evidence, the reviewing court makes its own independent determination of the policy's meaning. [Citation.] [¶] In interpreting an insurance contract, the court's fundamental goal is to give effect to the mutual intention of the parties. Such intent is inferred, if possible, solely from the written provisions of the contract. [Citation.] 'If contractual language is clear and explicit, it governs.' [Citation.] Words in an insurance policy are to be interpreted as a layperson would interpret them, in their '"ordinary and popular sense."' [Citations.] … [¶] If particular policy language is ambiguous, it is to be resolved by interpreting the ambiguous provisions in accordance with the insured's objectively reasonable expectations. [Citation.]" (*Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 35-36 (*Armstrong*).) "A policy provision is ambiguous only when it is capable of two or more constructions, both of which are reasonable." (*Amex Assurance Co. v. Allstate Ins. Co.* (2003) 112 Cal.App.4th 1246, 1251 (*Amex*).) In determining the objectively reasonable expectations of the insured, "the court must interpret the language in context, with regard to its intended function in the policy. [Citation.] This is because 'language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.' [Citations.]" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265, italics omitted.) If application of the

objectively reasonable expectations of the insured does not resolve the ambiguity, the policy provision will be construed in favor of the insured. (*Armstrong, supra,* 45 Cal.App.4th at p. 36.)

Exclusion clauses, which "'remove coverage for risks that would otherwise fall within the insuring clause,'" are interpreted narrowly against the insurer, while coverage clauses are interpreted broadly. (*Atlantic Mutual Ins. Co. v. Ruiz* (2004) 123 Cal.App.4th 1197, 1208.) To be enforceable, in addition to being unambiguous, exclusions must be phrased in clear and unmistakable language. (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 808 (*Reserve*).)

III. Professional Services Exclusion

"'[A commercial general liability] policy, often referred to as a business general liability policy, provides liability insurance for businesses.' [Citation.] In general, 'CGL policies are limited to providing coverage for accidental occurrences, and do not provide coverage for professional negligence claims.' [Citation.] 'The policy is written in two essential parts: the insuring agreement, which states the risk or risks covered by the policy, and the exclusion clauses, which remove coverage for risks that would otherwise fall within the insuring clause.' [Citation.]" (*Food Pro International, Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 985 (*Food Pro*).) The basic coverage provision in the business liability portion of the insurance policy Lemoore purchased from Golden Eagle states: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury,' 'property damages' or 'personal and advertising injury' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury,' 'property damage' or 'personal and advertising injury,' to which this insurance does not apply." There is coverage only if "[t]he 'bodily injury' or 'property damage' is caused by an 'occurrence.'" "'Occurrence' means an accident, including continuous or repeated

exposure to substantially the same general harmful conditions." Among the exclusions is the following:

> "This insurance does not apply to: … [¶] … [¶]
>
> "j. Professional Services
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> "'Bodily injury,' 'property damage,' or 'personal or advertising injury' caused by the rendering or failure to render any professional service. This includes but is not limited to:
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> "(1) Legal, accounting or advertising services;
>
> "(2) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications;
>
> "(3) Supervisory, inspection or engineering services;
>
> "(4) Medical, surgical, dental, x-ray or nursing services treatment, advice or instruction;
>
> "(5) Any health or therapeutic service treatment, advice or instruction;
>
> "(6) Any service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement or personal grooming;
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> "(7) Optometry or optical or hearing aid services including the prescribing, preparation, fitting, demonstration or distribution of ophthalmic lenses and similar products or hearing aid devices;
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> "(8) Body piercing services; and
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> "(9) Services in the practice of pharmacy.
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> "(10) Services while you are acting in a fiduciary or representative capacity including but not limited to, Real Estate Agents, Insurance Agents and Travel Agents.
>
> "(11) Financial services … [¶] … [¶]

"(12) Services in connection with the selling, licensing, franchising or furnishing of your computer software including electronic data processing programs, designs, specifications, manuals and instructions."

A. Interpretation of exclusion

Language of an insurance policy is interpreted in accordance with its ordinary and popular meaning unless the language is ambiguous, that is, "capable of two or more constructions, both of which are reasonable." (*Amex, supra,* 112 Cal.App.4th at pp. 1250-1251.) In *Hollingsworth v. Commercial Union Ins. Co.* (1989) 208 Cal.App.3d 800 (*Hollingsworth*), a cosmetics store pierced a customer's ears, resulting in serious injury and disfigurement. The store was insured under a policy that covered "bodily injury 'caused by an occurrence insured by this policy.'" (*Id.* at p. 803.) It excluded "'bodily injury or property damage due to the providing of, or failure to provide, any professional service." (*Ibid*.) The insured argued that a professional service was "'one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.'" (*Id*. at p. 806.) Since ear piercing involved only the mechanical operation of an ear piercing tool, she contended it was not a professional service.

The court concluded "that an insured's claim of coverage for 'professional services' must be evaluated in light of all the relevant circumstances in which that claim arises, including, but not limited to, the term's commonly understood meaning, the type and cost of the policy, and the nature of the enterprise." (*Hollingsworth, supra*, 208 Cal.App.3d at p. 806.) Looking at dictionary definitions and prior judicial authorities, the court noted that that term "professional" had long ceased to be restricted to those activities traditionally considered to be professions. (*Id*. at pp. 806-807.) The court stated that, in construing the term in the context of the insurance policy, it must look "'not to the title or character of the party performing the act, but to the act itself.'" (*Id*. at p. 807.) For example, where the policy was issued to a beauty parlor, "professional

services" referred to technical work performed by the beauticians and hair-dressers. (*Ibid*.) Analyzing the relevant factors, the court concluded ear piercing was a professional service excluded from the policy coverage.

> "The injury resulting from the faulty ear piercing occurred while Hollingsworth was operating a retail cosmetics store. Her policy with Commercial was designated a 'Merchants Package Policy' and protected against certain types of property and liability losses for an annual premium of $132. In general, the policy provided property coverage to the extent Hollingsworth sustained damage to her business property or equipment or suffered a resulting interruption in business. As to liability coverage, the policy contained numerous specific exclusions, including the rendering of professional services, but otherwise generally included any 'accident arising out of [the] business operations.' Thus, by its nature the policy itself suggested the type of activities falling within the professional services exclusion.
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> "In essence, Hollingsworth secured from Commercial the business enterprise analog of a homeowner's policy, i.e., coverage protecting her interests in the property itself including continued operations as well as coverage for injuries to individuals while on the property. The injury to one of Hollingsworth's customers did not arise from any deficiency in the premises, such as a slippery floor or unsafe fixture, but from a separate and distinct service offered to benefit financially her interest in the enterprise and involving bodily intrusion however minor. The relatively low premium also underscores the limited nature of the coverage and dispels any reasonable expectation that it would extend to the type of injury suffered here.
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> "Furthermore, in the context of a cosmetics business, ear piercing clearly constitutes a professional service as distinguished from an activity incidentally related to its everyday operations. Such an enterprise is devoted to grooming and the improvement of personal appearance for which jewelry can be a significant enhancement. And, although Hollingsworth did not charge a monetary fee for piercing a customer's ears, neither was it performed gratis. The procedure was offered only with the purchase of a pair of earrings. Undoubtedly, attracting prospective purchasers into the store also provided additional economic incentive to Hollingsworth. Thus, the ear-piercing was a 'professional' service both in the sense that it constituted an aspect of the cosmetics sales profession and that it was done for and in anticipation of some form of financial gain." (*Hollingsworth, supra,* 208 Cal.App.3d at pp. 808-809.)

In *Tradewinds Escrow, Inc. v. Truck Ins. Exchange* (2002) 97 Cal.App.4th 704, Truck insured Tradewinds under a business owners insurance policy. A client sued Tradewinds, alleging Tradewinds' failure to close escrow caused her to lose financing on property she was purchasing and to be evicted. She also alleged Tradewinds' president "defamed her, harassed her, refused to return her deposit, and parked his car in front of the house and verbally assaulted her." (*Id*. at p. 707, fn. omitted.) Tradewinds' errors and omissions (E&O) insurer provided a defense. Truck refused to defend, asserting the lawsuit arose out of Tradewinds' failure to render professional services and fell within the policy exclusion for professional services. (*Id*. at p. 708.) Tradewinds sued Truck for breach of contract and breach of the covenant of good faith and fair dealing.

The court found Truck was not liable for damages for any breach of the duty to defend, because Tradewinds was defended by the E&O carrier and suffered no damage. It also found Truck had no duty to indemnify Tradewinds for the settlement it entered into with the client. The court explained:

> "CGL policies are limited to providing coverage for accidental occurrences, and do not provide coverage for professional negligence claims. [Citation.] Furthermore, 'bodily injury' coverage and 'property damage' loss provisions do not cover economic loss resulting from professional negligence. [Citation.] Hence, CGL policies often contain exclusions for loss resulting from the rendering of or failure to render professional services. [Citation.]
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> "'Professional services' are defined as those '"arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual."' [Citation.] It is a broader definition than 'profession,' and encompasses services performed for remuneration. [Citation.]
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> "Thus, courts have held numerous circumstances fall within the exclusion for professional services under a CGL policy, with the unifying factor being whether the injury occurred during the performance of the professional services, not the instrumentality of injury. [Citations.] On this standard alone, all of the claims alleged in the instant case would fall within

> the professional services exclusion because the alleged wrongful acts were committed during the performance of professional services, namely, the rendering of escrow services." (*Tradewinds, supra,* at p. 713.)

In *Amex, supra,* 112 Cal.App.4th 1246, a plumber installed a propane water heater at a friend's house. Shortly after, a fire destroyed the house. When Allstate, the insurer on the plumber's homeowners insurance policy, denied coverage of the judgment entered against the plumber, the plumber's assignee, Amex, sued for breach of contract and bad faith. Allstate was granted summary judgment on the ground the policy excluded coverage for professional services and business activities. (*Id*. at p. 1249.)

Allstate's policy excluded coverage for "'bodily injury or property damage arising out of the rendering of or failure to render professional services by an insured person'" and "'bodily injury or property damage arising out of the past or present business activities of an insured person.'" (*Amex, supra,* 112 Cal.App.4th at p. 1251.) Amex argued that plumbing was a craft or trade, rather than a professional service. The court "agree[d] with *Hollingsworth* that the ordinary meaning of the word 'professional' is no longer limited to the 'learned professions,' but has a broader scope that includes skilled services such as plumbing." (*Id.* at p. 1252.) Amex argued that the plumber was simply helping a friend when he installed the water heater. The undisputed evidence indicated the homeowner had paid the plumber for other work, and the plumber installed the water heater in the hope it would induce the homeowner to pay him for prior construction work he had done. He "was more than simply helping out a friend, he was seeking compensation." (*Ibid*.) Moreover, "it is the type of activity, rather than actual compensation, that controls whether the professional services or business activities exclusions apply." (*Ibid.*) The court concluded the professional services and business activities exclusions eliminated any potential for coverage and summary judgment was properly entered. (*Id*. at pp. 1252, 1253.)

In *Food Pro*, Food Pro was a consulting firm hired by Mariani Packing Company to assist in relocation of its operations to a new plant. (*Food Pro, supra,* 169 Cal.App.4th

at p. 979.) Part of Food Pro's work was to act as Mariani's representative in dealing with contractors and suppliers, to coordinate contractor activities on the project, and to make on-site inspections of the work to determine whether it was proceeding properly. A contractor removed a piece of equipment from the mezzanine of the plant, leaving a hole in the floor. Aamold, an employee of Food Pro, noticed this and notified employees of Mariani, who covered the hole, but did not bolt down the covering. Pettigrew, an employee of another contractor, fell through the hole and was severely injured. (*Id*. at p. 980.)

Pettigrew and his workers' compensation insurer made claims against Food Pro, alleging general negligence and premises liability. Farmers Insurance, which had issued Food Pro's CGL policy, denied coverage, based on the professional services exclusion. (*Food Pro, supra*, 169 Cal.App.4th at p. 981-982.) That exclusion provided that the policy did not apply to "'"bodily injury," … arising out of the rendering or failure to render any professional services by or for you, including: [¶] 1. The preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs, specifications; and [¶] 2. Supervisory, inspection or engineering services.'" (*Id*. at p. 981.) Food Pro sued Farmers Insurance; the trial court found the bodily injury arose out of Food Pro's rendering of supervisory services, and was therefore excluded from coverage. Because there was no potential for coverage, there was no duty to defend. (*Id*. at p. 984.)

The court reversed. It acknowledged that Food Pro provided professional services to Mariani. There was evidence, however, that Farmers Insurance was advised from the outset that it was Mariani's responsibility to cover the hole in the floor, and Food Pro was not required to protect workers from injury or to ensure the safety of the site. (*Id*. at p. 987.) Food Pro was to determine when each piece of equipment was to be disconnected, but the individual contractors determined how to complete each project. Food Pro's supervisory role was limited to coordination of the overall process, and the

contractors were responsible for the details of their work. (*Ibid*.) The court concluded "Aamold was not providing supervisory or engineering services, or any other specialized skill, in relation to Pettigrew's accident." (*Id*. at p. 988.) "Food Pro's facts instead suggest Aamold's involvement in the accident was merely as an observer who noticed the danger and notified the responsible party. Thus, any failure to rectify the situation or warn of the danger, as alleged in the Pettigrew complaint, would implicate only ordinary negligence." (*Ibid*.) The court rejected Farmers' contention that Aamold was only on site to perform professional duties, so any act of his on site that resulted in injury arose from a professional service. After reviewing *Hollingsworth*, *Tradewinds*, and similar cases, the court summarized: "With this background, we read *Tradewinds*'s summation of the reach of the professional services exclusion as follows: the act that precipitated the injury need not have been one of professional malpractice, as long as the plaintiff was injured in the performance of the professional service." (*Id*. at p. 991.) The court concluded:

> "The injury in each [case cited] arose from the performance of a professional service, not merely at the same time the insured was otherwise providing professional services to a third party. Here, the only link between Food Pro's rendering of engineering services and Pettigrew's injury is that the allegedly wrongful actions occurred while Food Pro was on site to provide professional services to Mariani. As Food Pro's evidence shows, it did not design or direct the removal of the extruder, nor did it direct Pettigrew's actions on March 5 as part of its professional services. In other words, Aamold's involvement in the Pettigrew incident arose from his presence at the site, but the injury did not 'aris[e] out of the rendering or failure to render any professional services.'" (*Food Pro, supra*, 169 Cal.App.4th at p. 991.)

The action brought against Food Pro created a potential for a covered liability under the Farmers CGL policy, and therefore Farmers had a duty to defend. (*Food Pro, supra*, 169 Cal.App.4th at p. 991.)

In support of its motion for summary adjudication, Golden Eagle presented the following undisputed evidence. Lemoore contracted with the Kinirys to act as the

property manager for the Northgate Apartments in return for compensation. Lemoore agreed to "[f]urnish the services of its organization for the rental, leasing, operating, and management of the Property." It was authorized to "[m]ake, cause to be made, and/or supervise repairs, improvements, alterations, and decorations to the Property"; to "[c]ontract, hire, supervise, and/or discharge firms and persons … required for the operation and maintenance of the Property"; and to perform any of [its] duties through attorneys, agents, employees, and independent contractors." At the reference hearing, cross-complainants presented evidence that Lemoore supervised Young, the on-site manager, on behalf of the Kinirys. Lemoore instructed Young to perform inspections of the smoke detectors in all units every six months. Additionally, part of the move-in inspection procedure was to test the smoke detector and note on the inspection sheet if it was not operating. An expert retained by cross-complainants opined that it was the duty of the property management company to make certain that any unit without a smoke detector has one installed. Cross-complainants also presented evidence from which the referee could have inferred that the smoke detector in the decedents' apartment either was not present or was not functioning at the time of the fire.

At the reference hearing, cross-complainants also offered evidence of the clutter on the patio below the decedents' apartment, where the fire chief determined the fire originated. Cross-complainants' expert opined that it was below the appropriate standard of care of an apartment complex manager to allow a tenant to use her patio for storage; Lemoore and Young had a duty to make sure the tenant removed the items from her patio to eliminate the fire hazard.

Lemoore was a real estate broker whose business included providing property management services to clients. It was retained as the property management company for Northgate Apartments. Lemoore's liability to cross-complainants was based on its failure to properly supervise Young, to ensure that each apartment had a functioning smoke detector, and to eliminate a fire hazard by requiring the downstairs tenant to clear stored

property and debris off her patio. Thus, liability was predicated on Lemoore's failure to properly carry out its duties as the property manager. As the trial court concluded, Lemoore's liability was based on "the rendering or failure to render any professional service," construing that phrase in accordance with its ordinary and popular meaning. Property management was a regular part of Lemoore's business. It is a skilled profession or trade. The activities that formed the basis of Lemoore's liability to cross-complainants constituted an integral aspect of Lemoore's property management services for the Northgate Apartments, for which Lemoore was regularly compensated; those activities were not merely incidentally related to Lemoore's everyday operations. Further, they fell within the specific activities enumerated in the policy as examples of professional services: supervisory and inspection services, and services while the insured was acting in a fiduciary or representative capacity.

Lemoore and cross-complainants attempt to parse out specific tasks that may be performed by property managers, such as testing smoke detectors and installing new batteries in them, and remove them from the definition of professional services because they do not require special skill. They argue that, where liability arises out of the performance or failure to perform these unskilled tasks, the professional services exclusion should not apply. They rely on out-of-state authorities to support their argument. California cases do not hold that only skilled tasks performed by a business or professional in the course of providing its services constitute professional services within the meaning of a professional services exclusion. The ear piercing in *Hollingsworth* was not a task that required special skill. The court, however, considered the nature of the insured's enterprise, a cosmetics store, and concluded ear piercing was a distinct service offered to benefit that enterprise; it was part of the business of improvement of personal appearance, and offering free ear piercing attracted prospective purchasers into the store. "Thus, the ear-piercing was a 'professional' service both in the sense that it constituted an

aspect of the cosmetics sales profession and that it was done for and in anticipation of some form of financial gain." (*Hollingsworth, supra*, 208 Cal.App.3d at p. 809.)

In *Food Pro*, the acts of Food Pro's employee fell outside the professional services exclusion not because reporting a safety hazard was a task that did not require special skill, but because the employee was not performing services pursuant to Food Pro's contract with its client when he made the report. He was merely acting "as an observer, who noticed the danger and notified the responsible party." (*Food Pro, supra*, 169 Cal.App.4th at p. 988.)

Allison conceded in her declaration that, under the property management contract with the Kinirys, she supervised Young and instructed him to perform periodic inspections of the smoke detectors at Northgate Apartments. Young was authorized to replace inoperable smoke detectors and Allison received copies of invoices for some of the smoke detectors that he replaced. Lemoore and cross-complainants do not argue that supervising Young and determining when and how smoke detectors should be installed, inspected or replaced in accordance with the legal requirements for placement and maintenance of smoke detectors in apartment complexes are activities that require no special skill. The activities that gave rise to Lemoore's liability to cross-complainants were part and parcel of its professional services as a property management company.

The policy exclusion for professional services can and should be interpreted according to its ordinary and popular meaning. So interpreted, it excluded coverage for indemnity of Lemoore's liability to cross-complainants, and the trial court properly determined that Golden Eagle owed no duty to indemnify Lemoore for that liability.

B. Clear and unmistakable language

Lemoore and cross-complainants contend that a policy exclusion must be "phrased in clear and unmistakable language" in order to be enforceable. (*Reserve, supra*, 30 Cal.3d at p. 802.) Citing the principle of *ejusdem generis*, they contend the professional services exclusion was not clear and unmistakable about excluding property management

services, because the general language of the exclusion was followed by a specific list of activities that constitute professional services, but the list did not mention property management services. They assert that an insured would reasonably expect that property management services were not excluded because they were not part of the list.

"Under the principle of *ejusdem generis* (literally, 'of the same kind') [citations], where specific words follow general words in a contract, 'the general words are construed to embrace only things similar in nature to those enumerated by the specific words.' [Citations.]" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1045, fn. omitted.) The principle is a rule of construction only, and does not apply when the context demonstrates a contrary intention. (*Ortega Rock Quarry v. Golden Eagle Ins. Corp.* (2006) 141 Cal.App.4th 969, 985 (*Ortega*); *People v. McKean* (1925) 76 Cal.App. 114, 121.)

The context indicates the list following the general expression of the exclusion in the Golden Eagle policy was not intended to limit the scope of the exclusion, but to provide illustrative examples of the services to which the exclusion applied. The list is preceded by the words "[t]his includes but is not limited to." The term "includes" or "including" may be a term of enlargement rather than limitation. (*Ortega*, *supra*, 141 Cal.App.4th at p. 981, 982.) The policy exclusion expressly conveys the intent that the list is not a limitation; it indicates the general term "professional services" not only "includes," "but is not limited to" the list that follows. The list that follows is extensive and broad, including activities ranging from legal, accounting, and advertising services, to personal grooming, body piercing, and hair removal or replacement services. It includes categories that encompass or are of the same general kind as the services provided by Lemoore on which its liability to cross-complainants was predicated, such as "[s]upervisory, inspection, or engineering services" and "[s]ervices while you are acting in a fiduciary or representative capacity including but not limited to, Real Estate Agents, Insurance Agents and Travel Agents." A reasonable insured would anticipate that the

activities of a real estate broker acting as a property manager and supervising the on-site manager would qualify as professional services within the exclusion.

C. Conflict between exclusion and basic grant of coverage

Lemoore and cross-complainants contend the professional services exclusion withdraws so much of the basic grant of coverage in the liability portion of the insurance policy that it cannot be enforced. In *Melugin v. Zurich Canada* (1996) 50 Cal.App.4th 658 (*Melugin*), cited by Lemoore, Zurich issued a commercial general liability policy that expressly included liability for sexual discrimination in its definition of covered personal injury. (*Id*. at p. 660.) The insured was sued by former employees for sexual discrimination and related torts. Zurich refused to defend the insured and denied indemnity coverage. The court first determined coverage was not barred by Insurance Code section 533, which provided that "'[a]n insurer is not liable for a loss caused by the wilful act of the insured.'" (*Id*. at p. 664, fn. 1.) That section applied only to willful and intentional acts, and there could be acts constituting sexual discrimination in employment that involved only unintentional, negligent conduct, for which coverage might exist. (*Id*. at p. 665.)

The court then concluded coverage was not barred by an exclusion for "'personal injury sustained by any person as a result of an offense directly or indirectly related to the dismissal of any employee of the Insured.'" (*Melugin, supra,* 50 Cal.App.4th at p. 668.) The employees' claims were not related to dismissal from employment. Additionally, "[t]he mere act of unintentionally discriminating against someone in violation of the law cannot be an 'offense' negating the very coverage granted to the insured for claims of 'discrimination' by the policy itself. This interpretation by Zurich of its policy would result in an entirely fictional grant of coverage, by which the express grant of coverage for claims of discrimination would be empty and idle because such claims in all cases would be barred by section 533 or by inapplicable policy exclusions." (*Id*. at p. 669.)

The policy Golden Eagle issued to Lemoore did not expressly extend coverage to Lemoore for bodily injury caused by its professional services, then completely withdraw that coverage through the professional services exclusion. The policy was not an errors and omissions policy, insuring against professional malpractice, so that excluding coverage for injuries arising from the rendering or failure to render professional services would make the coverage provided illusory. Rather, Lemoore's policy was a business liability policy, which provided coverage for accidental occurrences involving ordinary negligence, such as accidents occurring on its business premises, not for professional negligence. The professional services exclusion did not render the coverage offered by the policy illusory or virtually nonexistent.

Lemoore and cross-complainants attempt to establish broader coverage by quoting phrases from the policy's definition of an insured. They cite the portion of the policy defining "Who Is An Insured" that provides:

> "1. If you are designated in the Declarations as:
>
> "a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner."

Lemoore and cross-complainants seem to argue that this provision extends coverage to it for the conduct of its business, and therefore the professional services exclusion withdraws the same coverage this provision grants. The language quoted, however, is not part of the basic insuring agreement, which identifies the risks covered by the policy. It merely reflects that, although the insured is an individual, the policy extends to business liabilities, not to the individual's personal liability incurred outside the business context. Further, Lemoore's analysis ignores subdivision d. of the "Who Is An Insured" definition, which provides that, if the insured is designated in the declarations as "[a]n organization other than a partnership, joint venture or limited liability company, you are an insured." In that situation, the organization is the insured; there is no mention of "the conduct of a business." The declarations page of the Golden

Eagle policy indicates it was issued to Glenda and James Allison, dba Lemoore Real Estate, but identifies the form of the business as a corporation. Thus, the insured was not designated in the declarations as an individual, but as a corporation. The "conduct of a business" language Lemoore and cross-complainants rely on does not apply to Lemoore.

The professional services exclusion did not withdraw virtually all of the coverage extended by the insuring agreement that defined Lemoore's business liability coverage. It was not unenforceable for this reason.

IV. Estoppel

Lemoore and cross-complainants contend the doctrine of estoppel should be applied to prevent Golden Eagle from invoking the professional services exclusion to avoid coverage for Lemoore's liability. Lemoore and cross-complainants seem to argue that estoppel may apply when the insurer is guilty of pre-loss negligence; they contend Golden Eagle's negligence, and that of its agent, in failing to recognize that Lemoore's business included property management, may form the basis for an estoppel that prevents it from invoking the professional services exclusion.

The trial court rejected the estoppel theory, concluding that "case law is clear that estoppel may not be relied upon to create coverage that does not exist." It further concluded negligence was not alleged in the cross-complaint, so it was not an issue framed by the pleadings and could not be raised in opposition to the motion for summary adjudication. Additionally, there was no evidentiary basis for finding an estoppel based on misrepresentations by Golden Eagle or its agent, since Lemoore and cross-complainants presented no evidence that any misrepresentations were made.

Lemoore and cross-complainants contend that, contrary to the conclusion of the trial court, pre-loss conduct of the insurer or its agent may give rise to estoppel to deny that a loss falls within the policy coverage. They cite *Middlesex Mutual Ins. Co. v. Ramirez* (1981) 116 Cal.App.3d 733, a case that did not involve any pre-loss conduct of the insurer. While the court stated that "'[An] insurance company may by its conduct or

dealings apart from the policy itself be estopped from denying that coverage has been furnished for a risk which the insured has been led to believe is protected under the policy,'" its decision was based solely on construction of the language of the two policies involved, and did not depend on any evidence outside the policies. (*Id*. at pp. 739, 740.) The other cases Lemoore and cross-complainants cite in support of their estoppel theory involved representations or misrepresentations about the scope of policy coverage made by the insurer or its agent at the time the insurance policy was purchased. (See, e.g., *Golden Gate Motor Transport Co. v. Great American Indem. Co.* (1936) 6 Cal.2d 439, 448, where insured asked agent for specific coverage for a particular vehicle and explained the relevant facts, insurer bound to give the protection contracted for; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 874, insurer bound by agent's assurance that policy provided coverage for particular property; *Ames v. Employers Casualty Co.* (1936) 16 Cal.App.2d 255, 266, where insurer promises to include specific coverage, insured may rely on promise and insurer is estopped from taking a different position; *Ivey v. United National Indemnity Company* (1958) 259 F.2d 205, evidence admissible to show estoppel where insured told broker specific type of coverage he wanted, broker discussed it with insurer and negotiated premium, and broker advised insured the risk was covered.)

Lemoore and cross-complainants presented no evidence in their opposition to Golden Eagle's motion for summary adjudication raising a triable issue of fact regarding misrepresentations that might give rise to an estoppel. They presented no evidence Lemoore requested coverage for injuries arising out of its professional services; rather, the evidence indicated that, around the time Allison purchased Lemoore, she told the agent, Bacome, that she wanted to renew the then-existing policy acquired by the prior owner of Lemoore. That policy, like the Golden Eagle policy, contained a professional services exclusion. Allison stated she reviewed the prior policy before she purchased the business. Thus, there was no evidence Golden Eagle provided a policy that was not the

policy for which Allison asked. Lemoore and cross-complainants presented no evidence that Golden Eagle or its agent made any representations to Lemoore that liability for injuries arising out of its professional services was covered by the policy.

Lemoore and cross-complainants base their estoppel argument on the alleged negligence of Golden Eagle and its agent in failing to realize that Lemoore's business included property management. They assert that, despite Lemoore's name, Bacome erroneously informed Golden Eagle that Lemoore's business did not include property management, and Golden Eagle issued the policy without recognizing its business included property management. Bacome admitted this was a mistake. Lemoore and cross-complainants seem to contend that, because Bacome and Golden Eagle misapprehended the nature of their business, it issued the wrong type of policy for a property management company and, if the mistake had not occurred, Lemoore would have obtained a policy that covered its property management services.

Lemoore and cross-complainants cite no authority for basing estoppel on the alleged negligence of the agent in understanding the nature of the insured's business. "'"The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury."' [Citations.]" (*People v. Castillo* (2010) 49 Cal.4th 145, 155, fn. 10.) Lemoore and cross-complainants presented no evidence that Golden Eagle or its agent intentionally led Lemoore to believe its policy provided coverage for bodily injury caused by rendering or failure to render any type of professional services. There was no

evidence Golden Eagle or its agent was apprised of the relevant facts, acted contrary to those facts, or intended Lemoore to rely on its acts.

Although the Golden Eagle policy provided the coverage Lemoore asked Bacome to obtain, Lemoore and cross-complainants seek to create coverage (for which Lemoore did not ask or pay) for liability arising out of Lemoore's professional services based on the fortuity of a mistake by the insurer and the agent about whether Lemoore engaged in property management. Lemoore and cross-complainants argue that Golden Eagle and Bacome did not realize that Lemoore's business included property management, and they issued it "a policy that was never intended to be issued to a commercial-property manager." The significance of the mistake is not clear. Golden Eagle did not deny coverage on the ground Lemoore is a property management company as well as a real estate broker, or because the liability arose out of Lemoore's property management business. It denied coverage because liability arose out of Lemoore's professional services and that liability was excluded by the professional services exclusion. Lemoore and cross-complainants presented no evidence the outcome would have been different in the absence of the mistake. For example, there was no evidence that, if Golden Eagle had issued Lemoore a business liability policy with knowledge that its business included property management, the policy would not have included a professional services exclusion. In any event, Lemoore and cross-complainants have not demonstrated that Golden Eagle was apprised of the fact that Lemoore engaged in property management, acted contrary to that fact, and intended that Lemoore act in reliance on that conduct; thus, the elements of estoppel were not satisfied.

Despite the Supreme Court's formulation of the elements necessary to establish an estoppel, Lemoore and cross-complainants rely on *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455 (*Hollister*) to argue that there are only three elements, and that their opposition presented evidence to support the existence of these elements. According to *Hollister,* "[a] more accurate description of the elements of equitable

estoppel would appear to be: (1) The party to be estopped has engaged in blameworthy or inequitable conduct; (2) that conduct caused or induced the other party to suffer some disadvantage; and (3) equitable considerations warrant the conclusion that the first party should not be permitted to exploit the disadvantage he has thus inflicted upon the second party." (*Id*. at p. 488.) Even applying that formulation of the doctrine, however, Lemoore and cross-complainants failed to raise a triable issue of fact.

There was no evidence Golden Eagle or Bacome engaged in blameworthy or inequitable conduct. Allison asked Bacome to renew Lemoore's business liability policy. Bacome provided Lemoore with a new policy that contained the same coverage as the prior policy. It contained the same professional services exclusion as the prior policy. Lemoore and cross-complainants presented no evidence that Bacome misrepresented the nature or extent of the coverage provided. They presented no evidence the policy procured by Bacome did not provide the same coverage as the prior policy that Allison sought to have renewed, or that the prior policy would have covered Lemoore's liability for bodily injury caused by rendering or failing to render professional property management services. There was no evidence Allison asked for a policy providing coverage for professional negligence for either Lemoore's business as a real estate broker or its business of property management. She could have had no reasonable expectation that such coverage would be included in the policy provided, when she merely sought the same coverage as in the existing policy, which she had an opportunity to review prior to purchasing Lemoore. Bacome had no reason to believe she wanted or expected broader coverage than the prior policy provided, when she merely asked for a renewal of the existing policy.

Lemoore and cross-complainants also characterize as negligence Golden Eagle's and Bacome's failure to issue a policy that included all the coverage Lemoore needed,

failure to inform Lemoore of the gap in its coverage, and failure to include in its written policy proposal any mention of the professional services exclusion.[2] "An insurance agent has an 'obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured.' [Citation.]" (*Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1461.) "[A]s a general proposition, an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage.... The rule changes, however, when—but only when—one of the following three things happens: (a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided ..., (b) there is a request or inquiry by the insured for a particular type or extent of coverage ..., or (c) the agent assumes an additional duty by either express agreement or by 'holding himself out' as having expertise in a given field of insurance being sought by the insured ...." (*Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927, fn. omitted.) There was no evidence to support application of any of the three exceptions. Thus, there was no factual basis for imposing a duty on Bacome to do more than provide the insurance Allison requested for Lemoore; none of the suggested negligent acts breached any duty Bacome owed to Lemoore.

There also was no evidence of *Hollister*'s second element of estoppel—that Golden Eagle's or Bacome's conduct caused Lemoore to suffer some disadvantage. Golden Eagle supplied the policy requested by Lemoore; any disadvantage was the result of Allison's failure to request coverage other than that contained in Lemoore's then-

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[2] We reject the argument that Golden Eagle and Bacome had a duty to specifically advise Lemoore of the professional services exclusion because it "withdraws all coverage for any aspect of Lemoore's property-management business." The insuring clause of the policy applies to both aspects of Lemoore's business: the real estate brokerage and the property management business. Likewise, the exclusion limiting that coverage applies to professional services rendered in both aspects of its business. The exclusion does not withdraw all coverage for Lemoore's property management business, any more than it withdraws all coverage for Lemoore's real estate broker business.

existing business liability policy. Since there was no evidence of inequitable conduct by Golden Eagle or Bacome, there also was no evidence to support shifting the burden of the disadvantage to them pursuant to *Hollister*'s third estoppel element. The trial court correctly concluded Lemoore and cross-complainants failed to raise a triable issue of material fact supporting their estoppel theory, and failed to demonstrate that, based on the undisputed facts, estoppel was established as a matter of law.

DISPOSITION

The judgment is affirmed. Golden Eagle is awarded its costs on appeal.

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Hill, P.J.

WE CONCUR:

_____
Detjen, J.

_____
Franson, J.